

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS  
FOR MONTGOMERY COUNTY, MARYLAND

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**PETITION OF ELLIE N. SALOUR**  
**for a special exception for a child day care**  
**center for up to 30 children on property located**  
**at 15901 NewHampshire Avenue, Silver Spring,**  
**Maryland**

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OZAH Case No. SE 14-02

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Ellie N. Salour

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For the Petition

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Before: Lynn A. Robeson, Hearing Examiner

**HEARING EXAMINER'S OPINION AND DECISION**

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## I. STATEMENT OF THE CASE

Petition S.E. 14-02, filed on August 22, 2013, requests a special exception to operate a child day care center for up to 30 children.<sup>1</sup> The facility would be located on the main level of an existing one-family, detached home at 15901 New Hampshire Avenue, Maryland, in the RE-1 Zone.

Petitioner, who owns and resides in the home, has been operating an existing licensed child care business (*i.e.*, a “group day care home”) for up to 12 children. There is no special exception for the existing group day care home because such a facility is permitted without a special exception in the RE-1 Zone; however, a special exception is required to operate a child day care center in the RE-1 Zone, pursuant to Zoning Ordinance §59-C-1.31. The day care facility is called “International Children’s Center.” Exhibit 5.

Under the provisions of the Zoning Ordinance, §59-G-1.12, the Hearing Examiner is authorized to hear and decide this type of petition. On September 12, 2013, the Office of Zoning and Administrative Hearings issued a notice that the public hearing would be held before the Hearing Examiner on Friday, December 20, 2013. (Exhibit 23). Initially, the Petitioner posted one sign on the property; later, it came to the attention of the Hearing Examiner that a second sign was required, which was posted on November 13, 2013.

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<sup>1</sup> A “child day care center” is one of three types of “child day care facilities” defined in Zoning Ordinance §59-A-2.1. The other two are “family day care homes” for up to 8 children and “group day care homes” for up to 12 children. A “child day care center” is defined in §59-A-2.1 as:

- a. a dwelling in which child day care services are provided and the provider is not a resident and does not meet the requirements for a non-resident provider of a family day care home or a group day care home, or;
- b. a building in which child day care services are provided:
  - 1) for 13 or more children, or;
  - 2) which exceed the staffing limits of a family day care home, or a group day care home, or;
  - 3) for 24 hours a day provided that they are in conformance with state and local regulations.

The Technical Staff of the Maryland-National Capital Park and Planning Commission reviewed the petition and, in a report dated November 1, 2013, recommended approval with conditions, set forth below (Exhibit 30):<sup>2</sup>

1. The Special Exception for a Child Daycare Facility should be limited to the following:
  - Maximum of 30 children
  - Maximum of five employees
  - Maximum of 15 children outside at one time except for special events such as a holiday or end of school year events.
  - Hours of operation are Monday through Friday, 6:30 a.m. to 6:30 p.m.
  - Arrival and departure for children must be staggered between 6:30 a.m. and 10:30 a.m. and between 4:30 p.m. and 6:30 p.m.
2. Comply with Maryland State and Montgomery County standards for the operation of a child day care facility.
3. Provide a three foot high evergreen hedge to screen the six parking spaces from Harding Lane.
4. Obtain a permit for any signs if MCDPS determines that a variance is required or adjust the design of the signs to conform to all applicable regulations. A copy of the approved sign permit must be submitted to the Hearing Examiner.

At its public meeting on November 14, 2013, the Planning Board recommended approval of the special exception with Conditions Nos. 1 through 3 recommended by Technical Staff. It altered Condition No. 4 and added a fifth condition as follows (Exhibit 31):

5. Obtain a variance or adjust the design of the sign to conform to all applicable regulations. A copy of the approved sign permit must be submitted to the Hearing Examiner.
6. The Hearing Examiner should consider reserving jurisdiction to add conditions related to noise in the event that later evidence indicates it is warranted because the trees and solid fence are not sufficient.

The Hearing Examiner received one letter from the Cloverly Citizens Association

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<sup>2</sup> The Technical Staff report is frequently quoted and paraphrased herein.

questioning why Ms. Salour was not amending an existing application.<sup>3</sup> Except for a complaint that the notification sign was not easily visible, the Hearing Examiner received no other community responses regarding the special exception petition.

The hearing was convened as scheduled on December 20, 2013. The Petitioner adopted the findings and conclusions in the Technical Staff report as a part of her testimony and agreed to the conditions recommended by Technical Staff. T. 7. She did not agree with the Planning Board's recommendation that the Hearing Examiner retain jurisdiction to determine whether the facility will result in objectionable noise. According to Ms. Salour, Technical Staff was concerned because the next house downhill from her property did not meet certain guidelines. T. 13. This is discussed in more detail in Parts III and IV of this Report.

Because the second sign had not been posted for a full sixty days prior to the public hearing, the Hearing Examiner extended closing the record to January 12, 2014, to permit anyone in opposition to submit comments. None were received.

Based on a thorough review of the entire record, the Hearing Examiner concludes that the special exception should be granted, subject to the conditions prescribed herein.

## **II. FACTUAL BACKGROUND**

### **A. Subject Property**

The proposed child day care center would operate on the main level of an existing, single-family detached home at 15901 New Hampshire Avenue, Silver Spring, Maryland. The property's legal description is Block A, Lot 1, of the Bernhard Acres subdivision and consists of approximately 2.31 acres. The corner lot is shaped like a square and abuts both New Hampshire Avenue and Harding Lane. The existing dwelling is a one-story single-family detached home

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<sup>3</sup> As noted, operation of a group daycare home is permitted by right in the RE-1 Zone, therefore, no special exception is required.

with a basement. The main floor currently serves as a group day care for 12 children; the Petitioner resides on the basement level. An aerial photograph from the Technical Staff Report shows the location of the lot in relation to Harding Lane and New Hampshire Avenue (Exhibit 30, p. 3):



The rear yard on the northern side of the property includes a 4,000 square foot enclosed playground. Technical Staff reports that existing lighting includes a pole mounted light, two spot lights on the garage, solar foot candles, and residential-styled fixtures mounted on the front and rear entrances and on the garage entrance. Exhibit 30, p. 3. The front exterior is landscaped with a lawn and large shade trees along Harding Lane. Staff advises that there are “well-trimmed” plants along the front and sides of the lot, with a shaded back yard. The rear lot line is planted



with a thick buffer of Eastern Pine trees. *Id.* An existing circular drive provides one-way access egress and contains will contain 12 parking spaces. The Petitioner submitted several photographs the existing dwelling, the play area, and the exterior yard, examples of which are shown below and on the following pages (Exhibit 15):



**Playground Area (Exhibit 15(a)(iii))**



**Circular Drive with  
Parking (Ex. 15)(c)(i)**





**Front of Existing House  
Exhibit 15(a)(ii)**

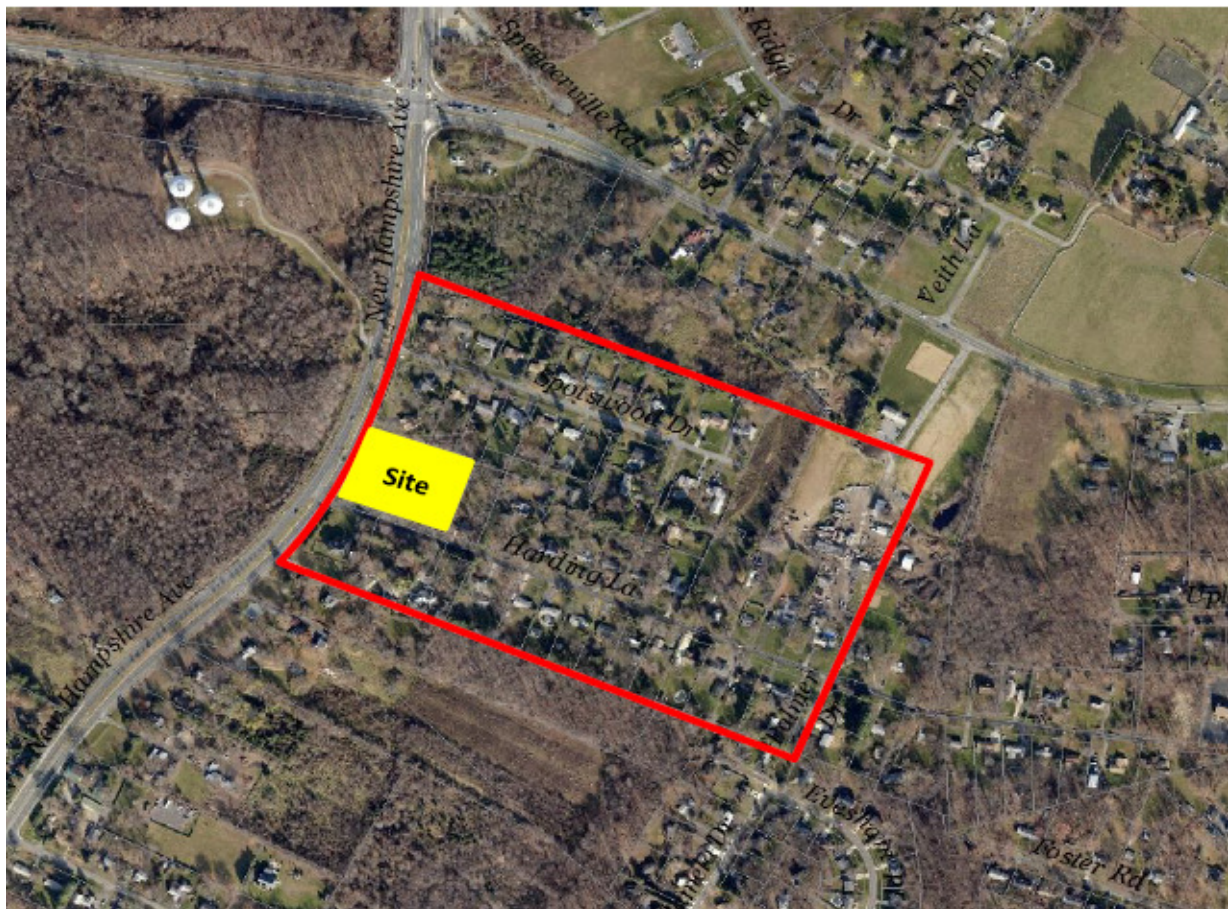


**Side Yard  
Exhibit 15(e)(i)**



## B. Surrounding Area

The boundary of the surrounding area must be delineated in order to measure the compatibility of the proposed use. Technical Staff defined the boundaries of the surrounding area as the properties located on the east side of New Hampshire Avenue, along both sides of Harding Lane and Spotswood Drive, and Palmer Drive. These boundaries are shown in an aerial photograph from the Technical Staff Report shown below (Exhibit 30, p. 4):



**Surrounding Area Defined by  
Staff (Exhibit 30, p. 4)**

Staff characterizes the area as low-density residential uses in the RE-1, RE-2C, and RC Zones. *Id.* Staff advises that there is one other special exception in the surrounding area, a home occupation for a one-chair beauty salon in the basement of a dwelling. The Cloverly commercial

center is located to the south of the property and the intersection of New Hampshire Avenue and Spencerville Road (Md. Route 198) is located to the northwest.

### **C. The Proposed Use**

#### **1. The Proposed Use:**

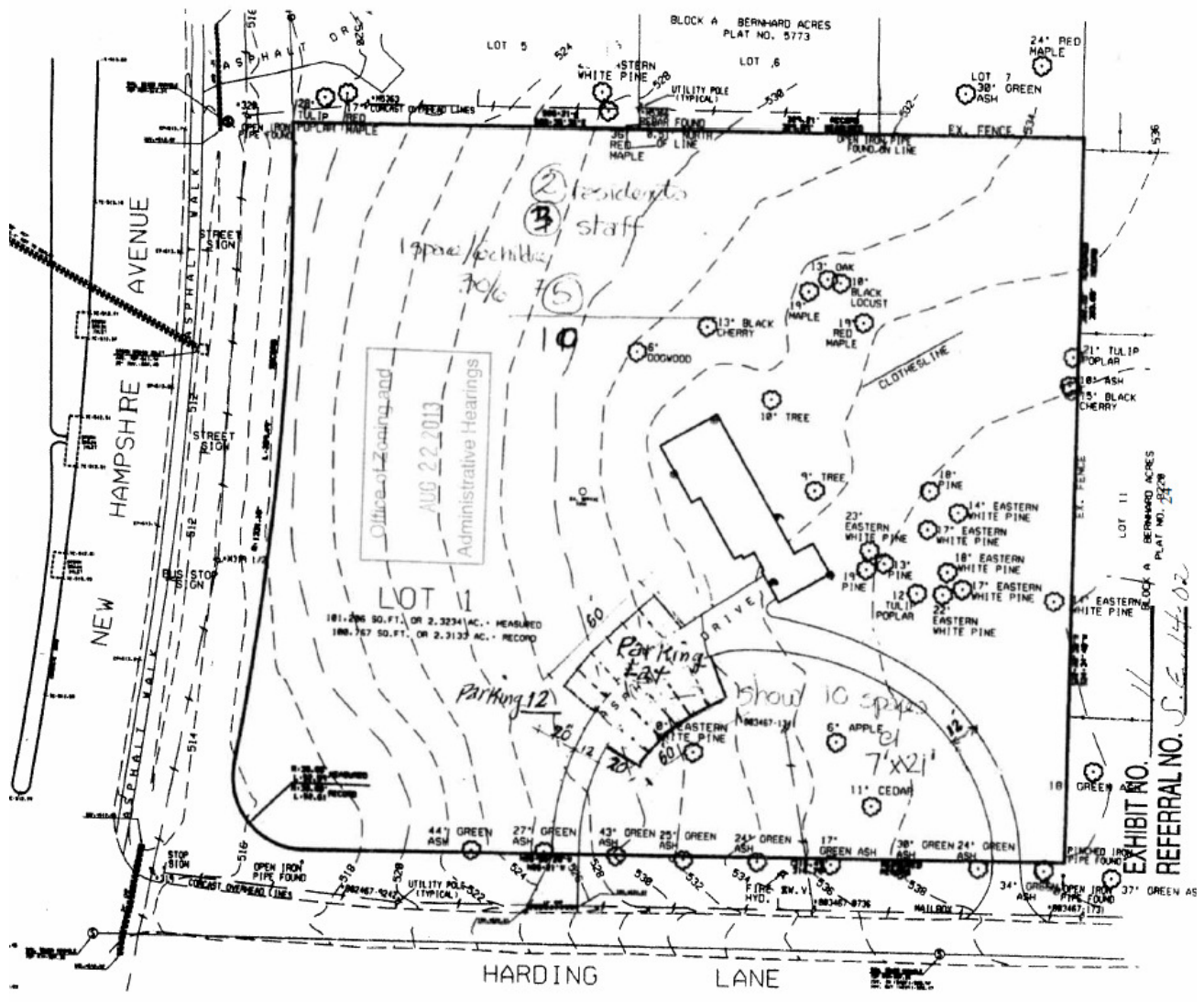
Petitioner, who owns and resides in the home, has been operating a licensed group day care home for up to 12 children. She now proposes to expand the existing “group day care home” for up to 12 children into a “child day care center” for up to 30 children, ranging in age from infants to four-years old. The day care facility is called “International Children’s Center.” Exhibit 5.

The proposed use will operate within the main floor of the existing one-story home. A one-way circular drive that contains 12 parking spaces provides access and egress as well as locations to drop off children. Access to the house will be from an asphalt pathway leading from the circular drive. The site plan, included in the Technical Staff Report (Exhibits 30, Attachment B, Exhibit 11) is shown on the following page.

The 4,000 square foot play area is located adjacent to the north side of the house and enclosed with a four foot fence. Children attending before-and-afterschool care will be transported by school bus from Cloverly Elementary School to a bus stop on New Hampshire Avenue near the center. Staff of the center will meet these children at the bus stop and escort them to the facility.

#### **2. Parking:**

The Petitioner proposes to have four full-time employees (including herself as director) and one part-time employee. The circular drive has six parking spaces on each side near the entrance, including a handicapped accessible space.



**Exhibit 11**  
**Site Plan/Landscape/Lighting Plan**

The number of parking spaces required for this use is determined by Zoning Ordinance §59-E-3.7, which provides, in relevant part:

***Child day care facility.*** For a family day care home or group day care home, one space for every non-resident staff member in addition to the residential parking requirement. The required number of spaces may be allowed on the street abutting the site. For a child day care center, one space for every non-resident staff member in addition to the residential parking requirement if applicable and adequate parking for discharge and pick up of children. In this instance, the average drop off and pick up space required is

*one space for every six children. Waivers and variances are allowed in accordance with the Zoning Ordinance.* [Emphasis added.]

Based on this provision, Technical Staff calculated that 11 parking spaces would be required – one (1) space for each of the four non-resident staff members (*i.e.*, 4 spaces), two (2) spaces for the resident staff person, and one space for every 6 children (*i.e.*, 5 spaces). Exhibit 30, p. 13. Staff found that the circular parking and driveway area are sufficient to accommodate staff and parent drop-off and pick-up, considering that Petitioner will stagger arrival times. Staff advises that a three-foot high evergreen hedge must be planted around the parking area facing Harding Lane to screen the parking from the street. Staff did not require landscaping for the six spaces facing New Hampshire Avenue.

3. Landscaping, Lighting and Signage:

As noted by Technical Staff, there is a significant amount of landscaping on the site already, which is marked on the Site Plan/Landscape Plan/Lighting Plan (Exhibit 11). The only additional planting required is the three-foot hedge surrounding the parking area facing Harding Lane.

The Petitioner does not propose any changes to the existing lighting on the property. Some of that lighting was not indicated on the site plan included in the Technical Staff Report, and Petitioner added these lights to the site plan at the public hearing. These lights included a light at the kitchen exit and a light over the walk-out basement where the Petitioner resides. Eight solar lights approximately 12 inches in height surround the parking areas. T. 33.

4. Operations:

Petitioners' proposal for conducting the child day care center is set forth in their Statement of Operations (Exhibit 5).



*a. Staffing:*

The proposed child day care center will have a total of four full time employees and one part-time employee. The Petitioner will be a full-time director of the facility and will reside in the dwelling. The Petitioner proposes to stagger the arrival and departure time of non-resident employees, as set forth in the following chart, included in Petitioner's Statement of Operations (Exhibit 5) and reproduced in the Technical Staff Report (Exhibit 30):

**Non- Resident Staff's Working Schedule**

	Arrival	Departure
<b>Staff 1</b>	<b>6:30 AM</b>	<b>6:30 PM</b>
<b>Staff 2</b>	<b>8:00 AM</b>	<b>6:30 PM</b>
<b>Staff 3</b>	<b>9:00 AM</b>	<b>6:00 PM</b>
<b>Staff 4</b>	<b>9:30</b>	<b>3:30</b>

The maximum number of staff is set forth as a condition in Part IV of this Opinion and Decision.

*b. Hours of Operation:*

The center's hours of operation hours are from 6:30 AM to 6:30 PM, Monday through Friday. These hours are also spelled out in a condition in the final part of this Opinion.

*c. Drop-off and Pick-up of Children:*

According to the Petitioner's Statement of Operations (Exhibit 5), children's arrival and departure times will be staggered generally in three groups, shown below:

	Arrival Time	Departure Time
<b>Group One</b>	<b>6:30- 8:30</b>	<b>4:30 or 5:00-5:30</b>
<b>Group two</b>	<b>8:30- 9:30</b>	<b>3:30 PM or between 5:30- 6:00 PM</b>
<b>Group three</b>	<b>9:30- 10:30</b>	<b>6:00 – 6:30 PM</b>

Compliance with the staggered times shown above is also required as a condition of approving this petition.

d. Outdoor Activities:

Technical Staff recommended that no more than 15 children at one time be outdoors to minimize noise. Exhibit 30, p. 2. At the public hearing, the Petitioner testified that it is unlikely that the maximum number of children will be outdoors at one time because outdoor play is staggered by age group. According to her, if licensed, she intends to have 9-10 infants and toddlers, which generally do not make loud noise. She or her staff typically walks the infants and toddlers she has now with a 6-person buggy. T. 13. She does not intend to have more than 10 children out at one time because they will go by age groups. T. 13. At times, the children play soccer on the northern portion of the property, and there is plenty of space in that area, which is about one acre, to buffer noise. T. 64. She does not believe that she will actually have a maximum of 15 children on the playground at once because playtimes are staggered by age groups. T. 65-67.

**D. Master Plan**

The subject property is located within the Residential Wedge area of the *1997 Cloverly Master Plan* (Master Plan). Exhibit 17. Staff characterizes the area as consisting of large lot residential subdivisions. Exhibit 30, p. 7. The Plan does not have specific recommendations pertaining to the subject property, although one goal for the area is to maintain the area's residential character. To further this goal to the "greatest extent feasible", the Plan recommends that the Hearing Examiner consider the following factors when considering special exception uses (Exhibit 13, p. 37):

- Maintenance of a residential appearance, where feasible.

- Compatibility with the scale and architecture of the adjoining neighborhood, consistent with the proposed use.
- The impact of signs, lighting, and other physical features on the surrounding residential communities.
- Location of parking, loading, and other service areas to maintain residential appearances to the extent feasible.
- Options for landscaping that minimize the non-residential appearance of the site and the view from surrounding properties and roads. It is preferable for landscaping to reinforce Cloverly's rural character and be consistent with the streetscape standards...of the Master Plan and the landscaping standards for special exceptions.
- When special exceptions are adjacent to each other or to commercial properties, review whether it is feasible and reasonable to consolidate driveways and connect parking areas.
- Any special exception application that exceeds the recommended imperviousness level for a particular watershed in a SPA must be reviewed to determine compliance with the appropriate laws.

Technical Staff concluded that the proposed use conforms to the recommendations of the Master Plan (Exhibit 30, p. 7):

The Subject Property is well landscaped and maintains its rural, residential appearance. The special exception proposes no exterior changes and will retain its residential appearance. The house is compatible with the scale and architecture of its adjoining neighborhood as it retains the original structure, and setback on a two acre lot. The residential lighting and non-illuminated sign will not be changed and does not provide a negative impact on the surrounding residential community. The location of parking will be maintained within the circular driveway and will retain its residential appearance. The property is not located in the Upper Paint Branch Special Protection Area (SPA) and this special exception does not propose any land disturbance and therefore does not require a review of a water quality plan, storm water, or sediment control plan.

The Hearing Examiner agrees with Technical Staff and the Planning Board that the use proposed here complies with the Master Plan and its recommendations for special exception uses. There is no change to the original structure, which still appears to be a single-family detached dwelling. Parking is adequate and contained within the circular driveway; parking

spaces will be screened from Harding Lane by a green hedge. There is no change to the exterior lighting, which is residential in character and the property is well-landscaped and maintained.

### **E. Public Facilities and Site Circulation**

Technical Staff reports that the proposed use will generate fewer than 30 new trips and less than 3 new peak hour trips, thus Local Area Transportation Review (LATR) or Transportation Policy Area Review (TPAR) are not required. Technical Staff found that site circulation and access were safe and adequate (Exhibit 30, p. 8):

The Applicant's proposal to increase the number of children from 12 to 30 will not have an adverse impact on the nearby road system. The Property is located off Harding Lane, which is a primary residential street and accessed via a 12-foot wide, one-way driveway. The existing vehicular access point and pedestrian circulation system on the nearby road system will not be affected by the proposal.

Technical Staff also found that the proposed 12 parking spaces were sufficient for clients and employees given that the Petitioner has agreed to stagger departure and arrival times. *Id.*

### **F. Environment**

Because the property is not within the Upper Paint Branch SPA and no additional land disturbance is required for the proposed use, Technical Staff advised that there are no environmental issues associated with the petition.

### **G. Community Reaction**

The Hearing Examiner has received nothing from the community either in support or in opposition to the petition.

## **III. SUMMARY OF TESTIMONY**

Ms. Salour testified that she has been in the child care business for over 20 years and has been an active member of the Montgomery County Coalition Council. She currently operates a day care at this location but wishes to expand, as she must turn away people because she has no



spaces. She believes that the demand stems from the quality of the program she offers. She believes that approval of her application will result in a great asset to the community. T. 6.

Ms. Salour adopted the findings and recommendations of the Technical Staff Report (Exhibit 30) as her own testimony. She agreed to abide by all conditions of approval recommended by Technical Staff. T. 7. She did not agree with the Planning Board that it was necessary for the Hearing Examiner to retain jurisdiction in order to see whether neighbors would have unacceptable noise levels. According to her, Technical Staff was concerned because the next house downhill from her property did not meet certain guidelines. T. 13. This house is a group home for the elderly and she has never had any complaints from them or the Cloverly Citizens Association regarding noise from the existing 12 children. T. 14.

She testified that Technical Staff did not measure the distance to the next house downhill from the subject property. If licensed, she intends to have 9-10 infants and toddlers, which generally do not make loud noise. She or her staff typically walks the infants and toddlers she has now with a 6-person buggy. T. 13. She does not intend to have more than 10 children out at one time because they will go by age groups. T. 13. At times, the children play soccer on the northern portion of the property, and there is plenty of space in that area, which is about one acre, to buffer noise. T. 64. She does not believe that she will actually have a maximum of 15 children on the playground at once because playtimes are staggered by age groups. T. 65-67.

She stated that she previously had a larger sign but took it down. She spoke with the Cloverly Citizen's Association regarding a mutually acceptable size for the sign, which is reflected in the application. The existing sign has been up since 2005. T. 8. She is unsure of the sign's exact measurements, but is willing to make changes if required. T. 9.

#### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning ordinance establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff and the Planning Board concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if they comply with the recommended conditions (Exhibits 30 and 31) and there is no community opposition to the proposed use.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Zoning Ordinance §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as the Petitioners comply with the conditions set forth in Part IV, below.

##### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. This provision specifies, “Inherent adverse effects alone are not a sufficient basis for denial of a special exception.” Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the

particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a “child day care center” use. Characteristics of the this use that are consistent with the “necessarily associated” characteristics of child day care center uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with child day care center uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff identified the following inherent characteristics of a child day care center (Exhibit 30, p. 9):

- (1) the dwelling and related outdoor child care equipment,
- (2) parking areas,
- (3) lighting,
- (4) noise generated by children
- (5) drop-off and pick-up areas,
- (6) outdoor play areas
- (7) hours of operation, and
- (8) employees of the child care facility, and
- (9) vehicular trips to and from the site.

Technical Staff concluded that there are no non-inherent effects of the use because the playground is not unusual in configuration or size, parking is adequate for the use, the residential

lighting will not change, the parent drop-off and pick-up areas are within the existing circular driveway, the outdoor play area is enclosed with a white fence and screened with trees, the hours of operation are typical of day care centers, and the vehicular trips to and from the site will not be significant. Technical Staff determined that there would be no unusual or objectionable noise from the site because the play area is setback 115 feet from the nearest residential home. *Id.* at 9. In addition, Staff determined (*Id.* at 10):

The expanded child daycare does not have any non-inherent adverse effects sufficient to form a basis for denial. The house size does not increase as a result of the Special Exception, the parking is located away from adjacent neighbors, and the headlight glare is blocked by a required evergreen screen. The traffic impact is within acceptable limits. In addition, the play area is located 115 away from the closest adjacent home.

The Hearing Examiner finds that the relevant site and operational characteristics of the proposed use are consistent with the inherent characteristics identified for a child day care center. The building is not of an unusual size or design for the neighborhood, but rather is an existing one-family residence in a residential area; the outdoor play area is enclosed by a fence, the parking area provides sufficient spaces for both employees and parents, and will be screened to preserve the residential character of the use. In addition, lighting is residential in style and will not be increased for this special exception; the amount of traffic generated would not be unusual (or even sufficient to generate a traffic study under the LATR); and operations at the day care center, from a land use perspective, will be consistent with the typical operations of such a facility.

## **B. General Standards**

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioners' documentary evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.



**Sec. 59-G-1.21. General conditions:**

(a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) *Is a permissible special exception in the zone.*

Conclusion: Child day care facilities are permitted by special exception in the RE-1 Zone pursuant to Zoning Ordinance §59-C-1.31.

(2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use would comply with the standards and requirements set forth for in Zoning Ordinance §59-G- 2.13.1, as detailed in Part IV.D of this report.

(3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject site is located within the Residential Wedge area covered by the 1997 *Cloverly Master Plan*. For the reasons discussed in Part II.D of this Report, the Hearing Examiner finds that the proposed will maintain the residential character of the neighborhood provided the parking spaces facing Harding Lane will be screened by a green hedge, which is a condition of approval included in Part V of this Report.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: The evidence demonstrates that the neighborhood is characterized by single-family residential uses. The Hearing Examiner agrees with Technical Staff and the Planning Board that the proposed use is compatible with the neighborhood because it will be contained within the existing dwelling and the intensity and character of the activity, traffic and parking is minimal.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: There is no evidence in this case that the use as proposed will have a detrimental impact on surrounding properties or the general neighborhood. The Hearing Examiner finds that this standard has been met.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: There is virtually nothing in the record that would support a condition for the Hearing Examiner to retain jurisdiction to monitor noise. The condition was not recommended by Technical Staff and the only explanation given was that the distance between the outdoor play area and the nearest dwelling did not meet certain guidelines that have not been identified. In contrast, the Petitioner testified that she will likely have no more than 10-12 children on the

playground at any one time because outdoor play time is staggered by age group. One age group, the infants and toddlers, do not make a lot of noise. Technical Staff found that the outdoor play area is adequately screened because of its distance from the nearest dwelling (i.e., 115 feet), the fence, trees and scrubs. Exhibit 30, p. 11. Based on this evidence, the Hearing Examiner finds that the Petitioner has met this standard without a condition requiring the Hearing Examiner to retain jurisdiction of the case.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff advised that there is only one other special exception in the area, a single-chair home beauty salon. The Hearing Examiner agrees with Technical Staff that the proposed special exception will not increase the intensity or scope of special exception in the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence summarized above supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception does not require approval of a preliminary plan of subdivision, by the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: The subject property does not require subdivision; therefore, the Hearing Examiner will make the determination whether public facilities are adequate, Technical Staff advises that the proposed use will generate fewer than three new trips during the morning and afternoon peak hour, and therefore, a traffic study is not required due to the center's minimal traffic impact. The Hearing Examiner finds that this standard has been met.

- (C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: The only evidence in this case supports a finding that the use will not reduce the safety of vehicular or pedestrian traffic. The site is served by a long, circular driveway that does permit stacking if any is necessary and has sufficient parking to serve both clients and staff. The Hearing Examiner concludes that the petition meets this standard, as did the Planning Board and Technical Staff.

### C. Specific Standards

The specific standards for Child Day Care Facilities are found in Code § 59-G-2.13.1.

The record in this case provides adequate evidence that the specific standards would be satisfied, as outlined below.

#### **Sec. 59-G-2.13.1. Child day care facility.**

(a) *The Hearing Examiner may approve a child day care facility for a maximum of 30 children if:*

(1) *a plan is submitted showing the location of all buildings and structures, parking spaces, driveways, loading and unloading areas, play areas, and other uses on the site;*

Conclusion: The submitted Site Plan/Landscape Plan/Lighting Plan (Exhibit 11) satisfies this requirement.

(2) *parking is provided in accordance with the parking regulations of article 59-E. The number of parking spaces may be reduced by the Hearing Examiner if the applicant demonstrates that the full number of spaces required in section 59-E-3.7 is not necessary because:*

(A) *existing parking spaces are available on adjacent property or on the street abutting the site that will satisfy the number of spaces required;*  
*or*

(B) *a reduced number of spaces would be sufficient to accommodate the proposed use without adversely affecting the surrounding area or creating safety problems;*

Conclusion: The number of parking spaces required for this use is determined by Zoning Ordinance §59-E-3.7, which provides, in relevant part:

***Child day care facility. . . . For a child day care center, one space for every non-resident staff member in addition to the residential parking requirement if applicable and adequate parking for discharge and pick up of children. In this instance, the average drop off and pick up space required is one space for every six children. Waivers and variances are allowed in accordance with the Zoning Ordinance. [Emphasis added.]***

Other requirements for parking are set forth in §59-E-2.83 of the Zoning Ordinance, included in

this section, below.

Technical Staff found the available parking of 12 spaces with one handicapped space to be sufficient because arrival times are staggered and the circular driveway provides adequate circulation and stacking space. The Zoning Ordinance requires a minimum of 11 spaces. Exhibits 30, p. 16. The Hearing Examiner finds that the on-site parking is adequate and meets the statutory standard.

Other relevant requirements for special exception parking facilities include the following:

*§59-E.2.83 Parking and loading facilities for special exception uses in residential zones.*

*(a) Location. Parking facilities must be located to maintain a residential character and a pedestrian-friendly street orientation.*

As pointed out by Staff, the existing, paved parking area is located in front of the residence and is well screened by existing landscaping. A green hedge surrounding the parking area facing Harding Lane is a condition of approval for this special exception. This requirement has been met.

*(b) Setbacks. Each parking and loading facility, including each entrance and exit driveway, must be setback a distance not less than the applicable building front and rear yard and twice the building side yard requirement in the Zone.*

Technical Staff advises that the circular driveway and parking areas meet these setbacks. Having no evidence to the contrary, the Hearing Examiner finds that the requirement has been met.

*(c) Screening. Each parking and loading facility, including driveway and dumpster areas, must be effectively screened from all abutting lots. Screening must be at least six feet high, and must consist of evergreen landscaping, a solid wood fence, a masonry wall, a berm or a combination of*



*them. Along all street right-of-ways screening of any parking and loading facility must be at least three feet high and consist of evergreen landscaping, a solid wood fence, or a masonry wall.*

The Petitioner does not propose any dumpsters with this application. Staff reports that the Petitioner must install a three-foot high evergreen hedge to screen the six new parking spaces that face Harding Lane. Staff did not recommend additional screening along the property line because the front and side yards of the property are landscaped with mature trees, including a buffer of mature Eastern Pine, Tulip Poplar, and Black Cherry trees. Exhibit 30, p. 18. Based on this evidence, the Hearing Examiner finds that the proposed use does comply with the parking requirements contained in the Zoning Ordinance, provided the Petitioner installs the evergreen hedge, which is a condition of approval of this special exception

- (d) Shading of paved areas. Trees must be planted and maintained throughout the parking facility to assure that at least 30 percent of the paved areas, including driveways, are shaded. Shading must be calculated by using the area of the tree crown at 15 years after the parking facility is built.*

Because of the significant number of mature trees surrounding the circular driveway and parking area, Staff estimated that the total canopy cover currently exceeds 30% of the driveway. The Hearing Examiner finds that this criterion has been met without additional planting (except for the hedge along the parking area).

- (e) Compliance requirement. For any cumulative enlargement of a surface parking facility that is greater than 50% of the total parking area approved before May 6, 2002, the entire off-street parking facility must be brought into conformance with this Section. An existing surface parking facility included as part of a special exception granted before May 6, 2002, is a conforming use.*

According to Staff, surface parking conforms to the current front and side setbacks

required by the Zoning Ordinance. The six spaces being added to the facility does not expand the parking area more than 50 percent.

Returning to the special requirements for a child care center in §59-G-2.13.1(a) of the Zoning Ordinance, the third standard is:

- (3) *an adequate area for the discharge and pick up of children is provided;*

Conclusion: As discussed, Technical Staff found that there are adequate spaces for parent pick-up and drop-off, which will occur within the parking areas located within a one-way circular driveway. The Hearing Examiner agrees based on the evidence presented in this case. Exhibit 30.

- (4) *the petitioner submits an affidavit that the petitioner will:*

- (A) *comply with all applicable State and County requirements;*
- (B) *correct any deficiencies found in any government inspection; and*
- (C) *be bound by the affidavit as condition of approval for this special exception; and*

Conclusion: The required affidavit has been submitted (Exhibit 7).

- (5) the use is compatible with surrounding uses and will not result in a nuisance because of traffic, parking, noise or type of physical activity. The hearing examiner may require landscaping and screening and the submission of a plan showing the location, height, caliper, species, and other characteristics, in order to provide a physical and aesthetic barrier to protect surroundings properties from any adverse impacts resulting from the use.

Conclusion: Staff found the proposed use to be compatible with the neighborhood because it is proposed entirely within an existing dwelling except for the outdoor play area, which is setback 115 feet from the nearest dwelling and is well-screened with mature trees, shrubbery and flowers. The Hearing Examiner notes that the entire property is well-landscaped and well-maintained, with minimal traffic impact. For these reasons, the Hearing Examiner concludes that this requirement has been met.

- (b) *A child day care facility for 31 or more children may be approved by the Board of Appeals subject to the regulations in subsection (a) above, and the following additional requirements: . . .*

Conclusion: Not applicable.

- (c) *The requirements of section 59-G-2.13.1 do not apply to a child day care facility operated by a nonprofit organization and located in: . . .*

Conclusion: Not applicable.

#### **D. Additional Standards**

##### **59-G § 1.23. General development standards**

- (a) ***Development Standards.*** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: Technical Staff found that the proposed use conforms to the development standards of the RE-1 Zone. A table from page 13 of the Technical Staff Report (Exhibit 30) lists the applicable standards and the existing measurements for the subject site and is shown on the following page.

- (b) *Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: As discussed, the petition meets the parking requirements contained in the Zoning Ordinance.

- (c) ***Minimum frontage.*** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*

- (1) *Rifle, pistol and skeet-shooting range, outdoor.*
- (2) *Sand, gravel or clay pits, rock or stone quarries.*
- (3) *Sawmill.*
- (4) *Cemetery, animal.*
- (5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*
- (6) *Riding stables.*
- (7) *Heliport and helistop.*

Conclusion: This is not applicable to the subject property.

- (d) **Forest conservation.** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

RE-1 Development Standards	Required/Permitted	Proposed	Ordinance
Minimum net lot area	40,000 square feet	100,624 square feet	59- C-1.322(a)
Minimum lot width: - Along front building line - Along front street line	125 feet 25 feet	140 feet 140 feet	59- C-1.322(b)
Building setbacks: Minimum setback from a street Minimum side yard - One side - Sum of both sides Minimum rear yard	50 feet 50 feet 35 feet 35 feet	84 feet min. 115' and 96 feet 211 feet 90 feet*	59- C-1.323(a) 59- C-1.323(b)(1) 59- C-1.323(b)(1) 59- C-1.323(b)(2)
Maximum building: - Height	50 feet	19 feet in front	59-C-1.327
Coverage of lot	15%		59C-1.328
Off-street parking requirement - Home (garage spaces) - Child Day Care Facility: ▪ Staff (non-resident) ▪ Parent Drop Off/Pick Up - Total parking	2 parking spaces 1 parking space per staff person 1 parking space per 6 children 11 parking spaces	2 parking spaces 4 parking spaces 5 parking spaces 12 parking spaces	59-E-3.7 59-E-3.7 59-E-3.7 59-E-3.7

**Table Showing Required and Provided Development Standards  
Exhibit 30, p. 13.**

Conclusion: As noted in Part II of this Report, the proposed use is not subject to the County's Forest Conservation Law and the Petitioner has submitted a Forest Conservation Exemption (Exhibit 18).

- (e) **Water quality plan.** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the*

*approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Inapplicable. This provision applies only to sites where there will be land disturbance within a Special Protection Area, which is not the case here.

(f) ***Signs.*** *The display of a sign must comply with Article 59-F.*

Conclusion: Technical Staff found that the proposed sign meets all of the requirements of Section 59-F of the Zoning Ordinance and no evidence has been submitted to the contrary. As the Montgomery County Department of Permitting Services is primarily responsible for administering the sign regulations, Staff recommended a condition requiring the Petitioner to comply with all regulations or to obtain a variance from these requirements. Exhibit 30, p. 2. The Hearing Examiner includes this as a condition of approval as well. The Petitioner must file copies of the sign permit or approved variance with the Office of Zoning and Administrative Hearings.

(g) ***Building compatibility in residential zones.*** *Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: There will be no external building modifications, so the building will maintain its residential character.

(h) ***Lighting in residential zones.*** *All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

- (1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
- (2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: Technical Staff reports that no external changes to the existing lighting are proposed and “no direct light would intrude into any adjacent residential property.” Exhibit 30, p. 15. The Hearing Examiner therefore finds that there will not be objectionable illumination or glare at the site as a result of the special exception.

Based on the testimony and evidence of record, I conclude that the child day care center use proposed by Petitioner, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part IV of this Opinion and Decision.

#### IV. DECISION

Based on the foregoing findings and conclusions, Petition No. S.E. 14-02 for a special exception in the RE-1 Zone to operate a child day care center for up to 30 children in an existing single-family detached home, at 15901 New Hampshire Avenue, Silver Spring, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Petitioners shall be bound by all of their testimony and exhibits of record, and by their representations identified in this Opinion and Decision.
2. In accordance with Code § 59-G-2.13.1(a)(4), the Petitioners shall be bound by the Affidavit of Compliance submitted in connection with this case, Exhibit 7, in which Petitioners certified that they will comply with and satisfy all applicable State and County requirements, correct any deficiencies found in any government inspection, and be bound by the affidavit as a condition of approval for the special exception.
3. The number of children enrolled at the center shall not exceed 30 children. In no event shall the number of children exceed the number authorized by State licensing authorities, and the ages of the permitted children will be determined by State licensing authorities.
4. No more than three non-resident full-time employees, one non-resident part-time employee, and one full-time resident employee may be on site at any time.



5. Arrival and departure times for non-resident staff shall be staggered between 6:30 a.m. and 9:30 a.m. in the morning and between 3:30 p.m. and 6:30 p.m. in the evening as set forth in Petitioner's Statement of Operations (Exhibit 5).
6. The hours of operation will be between 6:30 a.m. and 6:30 p.m., Monday through Friday.
7. Arrival and departure times for the children shall be staggered between 6:30 a.m. and 10:30 a.m. during the morning drop-off and between 2:30 p.m. and 6:30 p.m. during the evening pick-up, as set forth in Petitioner's Statement of Operations (Exhibit 5).
8. No more than 15 children are permitted in the outdoor play area at any one time except for holiday or end of school year events.
9. The Petitioners shall maintain the grounds, daily, in a clean condition, free of debris.
10. Petitioners must provide or maintain all the fencing and landscaping depicted on the combined Site Plan/Landscape Plan/Lighting Plan (Exhibit 11); the evergreen hedge to be planted along the parking area facing Harding Lane must be a minimum of three feet high.
11. The sign must conform to all applicable regulations and a copy of the permit for the sign must be submitted to the Hearing Examiner. If necessary, Petitioner shall either obtain a variance or adjust the size of the sign. Petitioner shall file a copy of any approved variance with the Hearing Examiner.
12. Petitioners must comply with Maryland State and Montgomery County licensure requirements and standards for the operation of a child day care facility. Petitioners must also comply with their Statement of Operations (Exhibit 5), but the conditions specified in this Opinion and Decision control in the event of any conflict.
13. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: January 14, 2014



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Lynn A. Robeson  
Hearing Examiner

## **NOTICE OF RIGHT TO APPEAL**

Any person, board, association, corporation or official aggrieved by a decision of the Hearing Examiner under this section may, within ten days after this decision is rendered, appeal the decision to the Montgomery County Board of Appeals in accordance with the provisions of Section 59-G-1.12(g) of the Zoning Ordinance.

cc:     Petitioners  
          All parties of record  
          The Planning Board  
          Department of Finance  
          All parties entitled to notice of filing